Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings

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Summary

As part of the conflict with Al Qaeda and the Taliban, the United States has captured and detained numerous persons believed to have been part of or associated with enemy forces. Over the years, federal courts have considered a multitude of petitions by or on behalf of suspected belligerents challenging aspects of U.S. detention policy. Although the Supreme Court has issued definitive rulings concerning several legal issues raised in the conflict with Al Qaeda and the Taliban, many others remain unresolved, with some the subject of ongoing litigation.

This report discusses major judicial opinions concerning suspected enemy belligerents detained in the conflict with Al Qaeda and the Taliban. The report addresses all Supreme Court decisions concerning enemy combatants. It also discusses notable circuit court opinions addressing issues of ongoing relevance to U.S. detention policy. The report also addresses a few notable decisions by federal district courts that are the subject of ongoing *habeas* litigation. Finally, it describes a few federal court rulings in criminal cases involving persons who were either involved in the 9/11 attacks or were captured abroad by U.S. forces during operations against Al Qaeda, the Taliban, and associated entities.

Many of the rulings discussed in this report are discussed in greater detail in other CRS products, including CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea and Michael John Garcia; CRS Report RL34536, *Boumediene v. Bush: Guantanamo Detainees' Right to Habeas Corpus*, by Michael John Garcia; and CRS Report RS21884, *The Supreme Court 2003 Term: Summary and Analysis of Opinions Related to Detainees in the War on Terrorism*, by Jennifer K. Elsea.

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As part of the conflict with the Taliban and Al Qaeda, the United States has captured and detained numerous persons believed to have been part of or associated with enemy forces. Over the years, federal courts have considered a multitude of petitions by or on behalf of suspected belligerents challenging aspects of U.S. detention policy. The Supreme Court has issued definitive rulings concerning several legal issues raised in the conflict with Al Qaeda and the Taliban, including executive authority under the 2001 Authorization to Use Military Force (AUMF; P.L. 107-40) to detain properly-designated enemy belligerents captured on the Afghan battlefield; the application of at least some provisions of the 1949 Geneva Conventions to the conflict with Al Qaeda; and the ability of detainees held in the United States or at the U.S. Naval Station in Guantanamo Bay, Cuba to challenge the legality of their detention in *habeas corpus* proceedings. However, many other issues remain the subject of ongoing litigation, including the full scope of the Executive's detention authority; the degree to which noncitizens held at Guantanamo and other locations outside the United States are entitled to protections under the Constitution; and the authority of federal *habeas* courts to compel the release of such detainees into the United States if the Executive cannot effectuate their release to another country.

This report briefly summarizes major judicial opinions concerning suspected enemy belligerents[1] detained in the conflict with Al Qaeda and the Taliban. It discusses all Supreme Court decisions concerning enemy combatants. It also addresses notable circuit court opinions addressing issues of ongoing relevance to U.S. detention policy. The report also discusses a few notable decisions by federal district courts that are the subject of ongoing *habeas* litigation. Finally, it addresses selected federal court rulings in criminal cases involving persons who were either involved in the 9/11 attacks or were captured abroad by U.S. forces during operations against Al Qaeda and the Taliban.

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Supreme Court Decisions

Since 2004, the Supreme Court has made several rulings concerning enemy combatants. These have addressed, *inter alia*, the Executive's authority to detain enemy belligerents under the 2001 AUMF; the legality of military commissions established by presidential order to try suspected belligerents for violations of the law of war; and detainees' access to federal courts.

[1] The Obama Administration has discontinued the use of the term "enemy combatant" to describe persons detained pursuant to the law of war or the Authorization to Use Military Force (AUMF). *See* Department of Justice (DOJ), "Department of Justice Withdraws 'Enemy Combatant' Definition for Guantanamo Detainees," press release, March 13, 2009, http://www.usdoj.gov/opa/pr/2009/March/09-ag-232.html (hereinafter "DOJ Press Release"); In re Guantanamo Bay Detainee Litigation, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held At Guantanamo Bay, No. 08-0442, filed March 13, 2009 (D.D.C.) (hereinafter "Detention Authority Memorandum"). We use the terms "enemy combatant" or "enemy belligerent" broadly to describe persons who might be subject to detention or prosecution in connection with the conflict authorized by the AUMF as interpreted by the executive branch.

Hamdi v. Rumsfeld, 542 U.S. 507 (2004)[2]

The *Hamdi* case addressed the President's authority to detain "enemy combatants" as part of the conflict authorized by the AUMF, and whether a detained individual could seek independent review of the legality of his detention. Four separate opinions were written, with none receiving support of a majority of the justices. However, a majority of the Court recognized that, as a necessary incident to the 2001 AUMF, the President is authorized to detain persons captured while fighting U.S. forces in Afghanistan (including U.S. citizens), and potentially hold such persons for the duration of the conflict to prevent their return to hostilities.[3] A divided Court found that persons deemed "enemy combatants" have the right to challenge the legality of their detention before a judge or other "neutral decision-maker," with a majority clearly recognizing the existence of such a right in the case of a detained U.S. citizen.[4] In a plurality opinion joined by three other Justices, Justice O'Connor wrote that a citizen detained as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut the government's factual assertions before a neutral decision-maker, and has a right to counsel in connection with such a hearing. The plurality, suggested, however, that the exigencies of the circumstances of a detainee's capture may allow for a tailoring of enemy combatant proceedings "to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict," possibly allowing hearsay evidence and "a presumption in favor of the Government's evidence," as long as a fair opportunity to rebut such evidence is provided.[5]

Rumsfeld v. Padilla, 542 U.S. 426 (2004)[6]

The *Padilla* case, decided on the same day as *Hamdi*, concerned a *habeas* challenge by Jose Padilla, a U.S. citizen being held on U.S. soil as an "enemy combatant." Unlike Hamdi, however, Padilla was captured on U.S. soil, where he was declared an "enemy combatant" and militarily detained for his alleged involvement in an Al Qaeda plot to detonate a "dirty bomb." In a 5-4 ruling, the Court remanded the case without deciding the merits on the ground that Padilla's *habeas* petition had not been filed in the proper venue. In doing so, the majority did not reach the merits of Padilla's claim that any authority the President might have under the AUMF to detain "enemy combatants" did not extend to persons captured on American soil and away from the Afghan battlefield. Four Justices would have found jurisdiction based on the "exceptional circumstances" of the case and affirmed the holding below that detention is prohibited under the Non-Detention Act, 18 U.S.C. § 4001(a) (prohibiting the detention of U.S. citizens unless authorized by an act of Congress). Padilla filed a new petition in the Fourth Circuit, and the appellate court considered the legality of his detention in *Padilla v. Haft*, discussed *infra*.

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[2] For further discussion of *Hamdi*, see CRS Report RS21884, *The Supreme Court 2003 Term: Summary and Analysis of Opinions Related to Detainees in the War on Terrorism*, by Jennifer K. Elsea.

[3] Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (O'Connor, J., plurality opinion); *id.* at 588-589 (Thomas, J., dissenting).

[4] *Id.* at 518, 533 (O'Connor, J., plurality opinion, joined by Breyer, J., Kennedy, J., and Rehnquist, C.J.); 553 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.). Justices Scalia and Stevens supported a more limited view concerning the Executive's authority to detain U.S. citizens, believing that detention without criminal charge was only permissible if Congress suspended the writ of *habeas corpus*. *Id.* at 554 (Scalia, J., dissenting, joined by Stevens, J.).

[5] *Id.* at 533-534 (O'Connor, J., plurality opinion).

[6] For further discussion of the *Padilla* decision, see CRS Report RS21884, *The Supreme Court 2003 Term: Summary and Analysis of Opinions Related to Detainees in the War on Terrorism*, by Jennifer K. Elsea, *supra* footnote 2.

Rasul v. Bush, 542 U.S. 466 (2004)[7]

In *Rasul v. Bush*, the Court held in a 6-3 ruling that the federal *habeas corpus* statute, 28 U.S.C. § 2241, provided federal courts with jurisdiction to consider *habeas corpus* petitions by or on behalf of persons detained at the U.S. Naval Station in Guantanamo Bay, Cuba. Having found that Guantanamo detainees were entitled by statute to seek *habeas* review of their detention, the Court did not reach the issue of whether the constitutional writ of *habeas* also extended to noncitizens held at Guantanamo. Congress subsequently attempted to limit the reach of the federal *habeas* statute to Guantanamo detainees through the enactment of the Detainee Treatment Act of 2005 (DTA)[8] and the Military Commissions Act of 2006 (MCA).[9]

Hamdan v. Rumsfeld, 548 U.S. 557 (2006)[10]

In *Hamdan v. Rumsfeld*, the Supreme Court reviewed the validity of military tribunals established pursuant to presidential order to try suspected terrorists for violations of the law of war. The petitioner Hamdan was charged with conspiracy to commit a violation of the law of war. Prior to reaching the merits of the case, the *Hamdan* Court first had to determine whether the DTA stripped it of jurisdiction to review *habeas corpus* challenges by or on behalf of Guantanamo detainees whose petitions had already been filed prior to enactment of the DTA. In a 5-3 opinion, the Court held that the DTA did not apply to such petitions. Turning to the merits of the case, the majority held that the convened tribunals did not comply with the Uniform Code of Military Justice (UCMJ) or the law of war, as incorporated in the UCMJ and embodied in 1949 Geneva Conventions, which the Court held applicable to the armed conflict with Al Qaeda. The Court held that, at a minimum, Common Article 3 of the Geneva Conventions applies to persons captured in the conflict with Al Qaeda, according to them a minimum baseline of protections, including protection from the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The Court held that military commissions were not "regularly constituted" because they deviated too far from the rules that apply to courts-martial, without a satisfactory explanation of the need for departing from such rules. In particular, the Court noted that the commission rules allowing the exclusion of the defendant from attending portions of his trial or hearing some of the evidence against him deviated substantially from court-martial procedures.

A four-justice plurality of the Court also recognized that for an act to be triable under the common law of war, the precedent for it being treated as an offense must be "plain and unambiguous."[11] After examining the history of military commission practice in the United States and internationally, the plurality further concluded that conspiracy to violate the law of war was not in itself a crime under the common law of war or the UCMJ.

[7] For a more detailed summary of the *Rasul* opinion, see *id.*

[8] P.L. 109-148, Title X; P.L. 109-163, Title XIV.

[9] P.L. 109-366.

[10] For further discussion of the *Hamdan* opinion, see CRS Report RS22466, *Hamdan v. Rumsfeld: Military Commissions in the "Global War on Terrorism,"* by Jennifer K. Elsea.

[11] Hamdan v. Rumsfeld, 548 U.S. 557, 602 (2006) (Stevens, J., plurality opinion, joined by Souter, J., Ginsburg, J., and Breyer, J.).

Boumediene v. Bush, 553 U.S. __, 128 S.Ct. 2229 (2008)[12]

In the aftermath of the *Hamdan* decision, Congress enacted the Military Commissions Act of 2006 (MCA), which, *inter alia*, expressly eliminated court jurisdiction over all pending and future causes of action other than the limited review permitted under the DTA. In the 2008 case of *Boumediene v. Bush*, the Court ruled in a 5-4 opinion that the constitutional privilege of *habeas* extends to Guantanamo detainees.[13] In doing so, the Court stated that the Constitution's extraterritorial application turns on "objective factors and practical concerns."[14] The Court deemed at least three factors to be relevant in assessing the extraterritorial scope of the constitutional writ of *habeas*: (1) the citizenship and status of the detainee and the adequacy of the status determination process; (2) the nature of the site where the person is seized and detained; and (3) practical obstacles inherent in resolving the prisoner's entitlement to the writ.

The Court also found that MCA § 7, which limited judicial review of executive determinations of the *Boumediene* petitioners' enemy combatant status to that authorized by the DTA, did not provide an adequate *habeas* substitute and therefore acted as an unconstitutional suspension of the writ of *habeas corpus*. The majority listed a number of potential constitutional infirmities in the DTA review process, including the absence of provisions (1) empowering a reviewing court to order the release of a detainee found to be unlawfully held; (2) permitting petitioners to challenge the President's authority to detain them indefinitely; (3) enabling a presiding court to review or correct administrative findings of fact which formed the legal basis for an individual's detention; and (4) permitting the detainee to present exculpatory evidence discovered after the conclusion of administrative proceedings.

Although the *Boumediene* Court held that the constitutional writ of *habeas* extends to noncitizens held at Guantanamo, it did not opine as to the scope of *habeas* review available to detainees, the remedy available for those persons found to be unlawfully held by the United States, and the extent to which other constitutional provisions extend to noncitizens held at Guantanamo and elsewhere.

Gates v. Bismullah, 128 S.Ct. 2960 (2008) (Mem.)

Prior to the Supreme Court's decision in *Boumediene*, the D.C. Circuit Court of Appeals considered a number of challenges brought under the DTA in which detainees contested determinations by Combatant Status Review Tribunals (CSRTs) that they were properly detained as enemy combatants. In 2008, the government petitioned the Supreme Court to review two rulings by the D.C. Circuit regarding the scope of judicial review of CSRT determinations.[15] The

[12] A more extensive discussion of *Boumediene* is found in CRS Report RL34536, *Boumediene v. Bush: Guantanamo Detainees' Right to Habeas Corpus*, by Michael John Garcia.

[13] Boumediene v. Bush, 553 U.S. __, 128 S.Ct. 2229 (2008).

[14] *Id.* at 2258.

[15] The D.C. Circuit in July 2007 issued an order rejecting the government's motion to limit the scope of the court's review to the official record of the CSRT hearings. Bismullah v. Gates, 501 F.3d 178 (*Bismullah I*). The circuit court decided that in order to determine whether a preponderance of evidence supported the CSRT determinations, it must have access to all the information a CSRT is "authorized to obtain and consider, pursuant to the procedures specified by the Secretary of Defense." The court thereafter denied the government's request for rehearing, explaining its view that its previous order would not require a search for information that was not "reasonably available." Bismullah v. Gates, 503 F.3d 137(D.C. Cir. 2007) (*Bismullah II*).

Supreme Court granted certiorari and vacated the appellate court's decisions, remanding for reconsideration in light of the Supreme Court's decision in *Boumediene*. Upon remand, the D.C. Circuit reinstated without explanation its decisions, presumably because it did not find the *Boumediene* ruling to conflict with its decisions in these cases.

al-Marri v. Spagone, 129 S.Ct. 1545 (2009)

In December 2008, the Supreme Court granted certiorari to review an *en banc* ruling by the Fourth Circuit Court of Appeals regarding petitioner al-Marri, a lawful alien resident who had been arrested in the United States and thereafter detained as an enemy combatant. At the time, the Court's decision to review the Fourth Circuit's ruling was thought to have potentially set the stage for a definitive pronouncement regarding the President's authority to militarily detain terrorist suspects apprehended away from the Afghan battlefield. However, before the Court could consider the merits of the case, the government requested that the Court authorize al-Marri's release from military custody and transfer to civilian authorities to face criminal charges. The Court granted the government's request, vacated the appellate court's earlier judgment, and transferred the case back to the lower court with orders to dismiss it as moot. (See below for discussion of appellate court ruling).

Kiyemba v. Obama, 130 S.Ct. 1235 (2010)

In October 2009, the Supreme Court agreed to review a ruling by a three-judge panel of the D.C. Circuit Court of Appeals in the case of *Kiyemba v. Obama*, discussed *infra*. The *Kiyemba* case involved several Guantanamo detainees who, despite no longer being considered enemy combatants and been cleared for release, had not been transferred from Guantanamo on account of the government being unable to effectuate their release to a foreign country. The *Kiyemba* petitioners sought reversal of a D.C. Circuit ruling finding that a federal habeas court lacked the authority to compel the Executive to release the detainees into the United States. Following the Supreme Court's grant of certiorari, however, several *Kiyemba* petitioners were resettled in foreign countries, and the United States was able to find countries willing to settle the remaining petitioners, although five petitioners rejected these countries' offers for resettlement. On March 1, 2010, the Supreme Court vacated the appellate court's opinion and remanded the case in light of these developments. Because the Supreme Court had granted certiorari on the understanding that no remedy was available for the petitioners other than release into the United States, it returned the case to the D.C. Circuit to review the ramifications of the new circumstances. Litigation in *Kiyemba* remains ongoing.

Notable Circuit Court Rulings

The following section discusses major rulings made at the appellate court level regarding persons designated as enemy combatants that involve matters of continuing relevance to U.S. detention policy. It does not discuss those rulings that were subsequently overruled by the Supreme Court on the merits.

Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005)

After the Supreme Court vacated a ruling in his favor by the Second Circuit (see above), Jose Padilla filed a new petition in the District Court for the District of South Carolina. The district court granted Padilla's motion for summary judgment and ordered the government to release him from military detention, while suggesting Padilla could be kept in civilian custody if charged with a crime or determined to be a material witness.[16] Padilla's attorneys had based their argument on the dissenting opinion of four Supreme Court Justices, who would have found Padilla's detention barred by the Non-Detention Act, 18 U.S.C. § 4001(a), and the language in *Hamdi* seemingly limiting the scope of detention authority under the AUMF to combatants captured in Afghanistan. The government argued that Padilla's detention is covered under the *Hamdi* decision's interpretation of the AUMF as an act of Congress authorizing his detention because he is alleged to have attended an Al Qaeda training camp in Afghanistan before traveling to Pakistan and then to the United States.[17] The judge disagreed with the government, finding that more express authority from Congress would be necessary and that the AUMF contains no such authority. Accordingly, the court found Padilla's detention barred by 18 U.S.C. § 4001(a). The court also disagreed that the President has inherent authority as Commander-in-Chief of the Armed Forces to determine wartime measures.[18]

The Fourth Circuit Court of Appeals reversed, finding that Padilla, although captured in the United States, could be detained pursuant to the AUMF because he had been, prior to returning to the United States, "'armed and present in a combat zone' in Afghanistan as part of Taliban forces during the conflict there with the United States."[19] As the Supreme Court again considered whether to grant review, the government charged Padilla with conspiracy based on evidence unrelated to the original "dirty bomb" plot allegations and petitioned for leave to transfer him from military custody to a federal prison for civilian trial.[20] The Court granted the government permission to transfer Padilla[21] and later denied certiorari.[22] Padilla was found guilty and

[16] Padilla v. Hanft, 389 F. Supp. 2d 678 (D.S.C. 2005).

[17] *See* Respondents' Answer to the Petition for a Writ of Habeas Corpus at 2, Padilla v. Hanft, C/A No. 02:04 2221-26AJ (D.S.C. filed 2004).

[18] 389 F. Supp. 2d at 690.

[19] 423 F.3d 386, 390-91 (4th Cir. 2005).

[20] The government initially asked the Fourth Circuit to approve Padilla's transfer and suggested it should vacate its opinion, but the judges preferred to defer to the Supreme Court to make that determination. In rejecting the government's application, Circuit Judge Luttig (who has since stepped down from the bench) issued a harsh opinion expressing disappointment at the government's decision abruptly to abandon its position that national security imperatives demanded Padilla's continued military detention:

> [A]s the government surely must understand, although the various facts it has asserted are not necessarily inconsistent or without basis, its actions have left not only the impression that Padilla may have been held for these years, even if justifiably, by mistake—an impression we would have thought the government could ill afford to leave extant. They have left the impression that the government may even have come to the belief that the principle in reliance upon which it has detained Padilla for this time, that the President possesses the authority to detain enemy combatants who enter into this country for the purpose of attacking America and its citizens from within, can, in the end, yield to expediency with little or no cost to its conduct of the war against terror—an impression we would have thought the government likewise could ill afford to leave extant.

Padilla v. Hanft, 432 F.3d 582, 587 (4th Cir. 2005)(order).

[21] Padilla v. Hanft, 546 U.S. 1084 (2006).

[22] 547 U.S. 1062 (2006).

sentenced to 17 years and three months' imprisonment, the trial court having rejected his motion to dismiss charges against him due to his alleged mistreatment at the hands of the military.[23]

al-Marri v. Pucciarelli, 534 F.3d 213 (2008) (*per curiam*)[24]

In *al-Marri*, the Fourth Circuit sitting *en banc* considered whether the AUMF and the law of war permit the detention of a resident alien alleged to have engaged in activities within the United States in support of Al Qaeda, but who had not been part of the conflict in Afghanistan. Four of the nine judges would have held that even if the allegations were true, al-Marri did not fit within the legal category of "enemy combatant" within the meaning of *Hamdi*, and that the government could continue to hold him only if it charged him with a crime, commenced deportation proceedings, or obtained a material witness warrant in connection with grand jury proceedings (as a majority of the original three-judge panel had found). A plurality of the fractured *en banc* court, however, found that the AUMF and the law of war give the President the power to detain persons who enter the United States as "sleeper agents" on behalf of Al Qaeda for the purpose of committing hostile and war-like acts such as those carried out on 9/11 (although the judges did not arrive at a common definition of "enemy combatant"). The case was remanded to the district court for further consideration of the evidence to determine whether the government had established that al-Marri was a sleeper agent.

The *en banc* panel also considered the evidentiary burden that the government would be required to fulfill to detain al-Marri as an enemy combatant. In his controlling opinion, Judge Traxler wrote that the lower court had erred in applying the relaxed evidentiary standards of *Hamdi* to persons captured in the United States. While the *Hamdi* plurality suggested that hearsay evidence might be sufficient to support detention of a person apprehended in combat zone, Judge Traxler wrote that *Hamdi* does not establish a "cookie-cutter procedure appropriate for every alleged enemy-combatant, regardless of the circumstances of the alleged combatant's seizure or the actual burdens the government might face in defending the *habeas* petition in the normal way."[25] However, he recognized that some relaxation of normal procedural safeguards may be warranted if the government demonstrates the need for this relaxation on account of national security interests and an undue burden that would result if it was compelled to produce more reliable evidence.

After the Supreme Court granted review, the government brought charges against al-Marri in federal court and asked the Court to dismiss the case as moot and to vacate the decision below, which the Court agreed to do, leaving the applicability of the AUMF to persons captured in the United States uncertain. Al-Marri pleaded guilty to conspiring to provide material support to terrorists and was sentenced to eight and a half years in prison.

[23] United States v. Padilla, 2007 WL 1079090 (S.D.Fla. 2007) (unreported opinion). However, another district court held Padilla can pursue civil damages against a former government official for his treatment in military detention. Padilla v. Yoo, 633 F. Supp. 2d 1005 (N.D.Cal. 2009).

[24] For further discussion of *al-Marri*, see CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea and Michael John Garcia.

[25] al-Marri v. Pucciarelli, 534 F.3d 213, 221 (2008) (Traxler, J., concurring).

Kiyemba v. Obama, 555 F.3d 1022, *vacated*, 130 S.Ct. 1235 (2010)

In October 2008, a federal district court ordered the release into the United States of several Guantanamo detainees who were no longer considered enemy combatants but who could not be returned to their home country (China) because of the likelihood they would be subjected to torture there, finding that the political branches' plenary authority in the immigration context did not contravene the petitioners' entitlement to an effective remedy to their unauthorized detention.[26] However, the D.C. Circuit panel stayed the district court's order pending appellate review,[27] and subsequently reversed the district court's decision in the case of *Kiyemba v. Obama*, decided in February 2009. The majority held that although the constitutional writ of *habeas* enables Guantanamo detainees to challenge the legality of their detention, *habeas* courts lack authority (absent the enactment of an authorizing statute) to compel the transfer of a non-citizen detainee into the United States, even if that detainee is found to be unlawfully held and the government has been unable to effectuate his release to a foreign county. The *Kiyemba* panel's decision was primarily based on long-standing jurisprudence in the immigration context which recognizes that the political branches have plenary authority over whether arriving aliens may enter the United States. The majority of the panel also found that Guantanamo detainees were not protected by the Due Process Clause of the Constitution, as they are non-citizens held outside the U.S. and lack significant ties to the country.

As discussed *supra*, the Supreme Court granted certiorari to review the *Kiyemba* ruling, but thereafter vacated the appellate court's opinion and remanded the case in light of the fact that several countries have agreed to resettle the petitioners. The D.C. Circuit must now review the ramifications of these new circumstances.

Kiyemba v. Obama, 561 F.3d 509 (D.C. Cir.) ("*Kiyemba II*"), *cert. denied*, 2010 WL 1005960, 78 USLW 3302 (U.S. Mar. 22, 2010)

In a second case entitled *Kiyemba v. Obama*, decided in April 2009, a D.C. Circuit panel considered *habeas* petitions by detainees who were no longer considered enemy combatants, and who sought to prevent their transfer to any country where they would likely face further detention or torture. The *Kiyemba II* panel rejected the government's argument that the MCA stripped the court of jurisdiction to hear claims related to the petitioners' proposed transfer. The panel interpreted *Boumediene* as invalidating the MCA's court-stripping provisions with respect "to all *habeas* claims brought by Guantanamo detainees, not simply with respect to so-called 'core' *habeas* claims" relating to the legality of the petitioners' detention. However, the panel held that an executive branch determination that a detainee will not be tortured if transferred to a particular country is binding on the court, and a *habeas* court may not second-guess this assessment. The circuit panel also reversed a district court ruling that required the government to provide 30 days' notice to detainees' counsel before any proposed transfer. As a result of this ruling, the detainees' ability to challenge their proposed transfer from Guantanamo may be quite limited. On March 22, 2010, the Supreme Court denied a petition for writ of certiorari to review the appellate court's ruling.

[26] In re Guantanamo Bay Detainee Litigation, 581 F. Supp. 2d 33 (D.D.C. 2008).

[27] Kiyemba v. Bush, No. 08-5424, 2008 WL 4898963, Order (D.C. Cir., October 20, 2008) (*per curiam*).

Bismullah v. Gates, 551 F.3d 1068 (D.C. Cir. 2009)[28]

This case concerned the continuing availability of DTA review procedures in light of the Supreme Court's ruling in *Boumediene v. Bush* that the constitutional privilege of *habeas corpus* extends to non-citizen detainees held at Guantanamo. As discussed *supra*, following the Supreme Court's ruling in *Gates v. Bismullah*, the D.C. Circuit reinstated two earlier rulings concerning the scope of judicial review of CSRT determinations available under the DTA. The government subsequently petitioned for a rehearing of the case, arguing that the Supreme Court's ruling in *Boumediene* effectively nullified the review system established by the DTA, as Congress had not intended for detainees to have two judicial forums in which to challenge their detention. The D.C. Circuit granted the government's motion for rehearing, and in *Bismullah v. Gates*, a three-judge panel held that, in light of the Supreme Court's ruling in *Boumediene* restoring detainees' ability to seek *habeas* review of the legality of their detention, the appellate court no longer had jurisdiction over petitions for review filed pursuant to the DTA.

Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010)

In January 2010, a three-judge panel of the D.C. Circuit Court of Appeals considered the scope of the government's detention authority under the AUMF in the case of *Al-Bihani v. Obama*. In an opinion supported in full by two members of the panel,[29] the appellate court endorsed the definitional standard for the Executive's detention authority that had initially been asserted by the Bush Administration; namely, that the President may detain those persons who are "part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."[30] The petitioner claimed that he was merely a cook for a military unit associated with the Taliban during its conflict with the Northern Alliance in Afghanistan, and argued that his detention is inconsistent with the law of war and, by extension, the AUMF. While the panel concluded that either support for or membership in an AUMF-targeted organization may be independently sufficient to justify detention, it declined "to explore the outer bounds of what constitutes sufficient support or indicia of membership to meet the detention standard." It did, however, note that this standard would permit the detention of a "civilian contractor" who "purposefully and materially supported" an AUMF-targeted organization through "traditional food operations essential to a fighting force and the carrying of arms." Notwithstanding the government's reliance on the law of war to interpret the scope of the AUMF and seemingly in conflict with Supreme Court discussion of the issue in *Hamdi*, the panel rejected the idea that the international law of war has any relevance to the courts' interpretation of the scope of the detention power conferred by the AUMF.

The panel also held that the procedural protections afforded in *habeas* cases involving wartime detainees do not need to mirror those provided to persons in the traditional criminal law context.

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[28] A more detailed discussion of the *Bismullah* case is found in CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea and Michael John Garcia.

[29] A third member of the panel issued a separate opinion concurring with the majority's judgment. However, the opinion did not clearly endorse the majority's view as to scope of the Executive's detention authority. *See* Al-Bihani v. Obama, 590 F.3d 866, 883-885 (D.C. Cir. 2010) (Williams, J., concurring) (arguing that petitioner was detainable on account of being "part of" an AUMF-targeted organization, but not deciding whether a person could be detained on account of "support" for a targeted organization that he was not also a "part of").

[30] This standard had been slightly circumscribed by the Obama Administration, which had endorsed a standard that requires support to be "substantial."

The government need only support its authority to detain using a "preponderance of evidence" standard. The panel also held that *habeas* courts assessing the validity of a petitioner's detention may properly consider hearsay evidence proffered by the government.

Rasul v. Myers, 563 F.3d 527 (D.C. Cir. 2009) (*per curiam*), *cert. denied,* 130 S.Ct. 1013 (U.S. Dec. 14, 2009)

Four British nationals formerly detained at Guantanamo sued the Secretary of Defense and various military officers for damages, alleging that their treatment while in U.S. military custody violated their rights under the Fifth and Eighth Amendments to the Constitution, the Geneva Conventions, and other provisions of law. The district court dismissed the *Bivens*[31] claims on the basis of qualified immunity, holding that the officers could not reasonably be expected to have anticipated that the plaintiffs, as aliens held overseas, would be entitled to rights under the U.S. Constitution.[32] The D.C. Circuit twice affirmed,[33] interpreting *Boumediene* (on remand) as "disclaim[ing] any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause,"[34] which, in the circuit court's view, appears to mean that those detained at Guantanamo have no rights under the Constitution (other than the right to petition for *habeas corpus*). It rested its holding, however, on its analysis of qualified immunity under *Bivens*, agreeing with the lower court that even if the Constitution does provide some protections to the plaintiffs, the defendants were protected by qualified immunity. Even were this not so clear, the D.C. Circuit noted a "special factor" precludes extending a *Bivens* remedy to plaintiffs; namely, the "[t]he danger of obstructing U.S. national security policy."[35]

Having found that the claims for damages were barred by the Federal Tort Claims Act, the circuit court did not address whether *Boumediene*'s holding invalidating section 7 of the MCA encompassed only the portion of the provision that stripped courts of jurisdiction over *habeas* claims, or whether the language eliminating other causes of action against the government had also been invalidated. [36] District court judges have uniformly held that the language eliminating causes of action other than *habeas corpus* survived Boumediene.[37]

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[31] Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (providing for cause of action in tort for violation of certain constitutional rights).

[32] Rasul v. Rumsfeld, 414 F. Supp. 2d 26 (D.D.C. 2006).

[33] Rasul v. Myers, 512 F.3d 644 (D.C. Cir. 2008) ("Rasul I") was vacated by the Supreme court and remanded for reconsideration in light of *Boumediene*. 129 S.Ct. 763 (2008) Rasul v. Myers, 563 F.3d 527 (D.C. Cir. 2009) ("Rasul II") reinstated the earlier opinion but limited its scope to rest the holding on qualified immunity without adjudicating the constitutional questions. The appellate court reversed a holding by the district court that would have enabled plaintiffs to pursue claims based on the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb *et seq.*

[34] *Rasul II*, 563 F.3d at 529.

[35] *Id.* at 532 & n.5.

[36] 28 U.S.C. § 2241(e)(2), provides that

> [n]o court ... shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

[37] Al-Zahrani v. Rumsfeld, No. 09-0028, slip op. at 7 (D.D.C. 2010) (citing Al-Adahi v. Obama, 596 F. Supp. 2d 111, 119 (D.D.C. 2009); Khadr v. Bush, 587 F. Supp. 2d 225, 235-36 (D.D.C. 2009); *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d 312, 314 (D.D.C. 2008); *In re* Guantanamo Bay Detainee Litig., 570 F. Supp. 2d 13, 18 (D.D.C. (continued...)

District Court Opinions

The following section discusses significant rulings made by the federal district courts that are the subject of ongoing *habeas* litigation.

Recent District Court Rulings Concerning Scope of Executive Detention Authority

In the aftermath of the Supreme Court's decision in *Boumediene*, federal *habeas* courts reviewing claims raised by Guantanamo detainees have reached differing conclusions regarding the scope of the Executive's detention authority under the AUMF and the law of war. Judge Richard J. Leon, the first district court judge to rule on this issue post-*Boumediene*, applied the standard employed by the Department of Defense (DOD) in 2004 CSRT proceedings, which authorized the detention of those who were "part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners … [including] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed force."[38] More recent rulings by district courts have taken a more limited view of the Executive's detention authority. A few district court judges have held that the Executive has authority to detain persons who were "part of" or "substantially supported" Al Qaeda, the Taliban, or associated forces, so long as those terms are understood to include only those persons who were members of the enemy organizations' *armed forces* at the time of capture.[39] Other judges have held that the Executive has authority under the AUMF and the law of war to detain persons who were "part of" the Taliban, Al Qaeda, or associated forces, but lacks authority to detain non-members who provide "support" to such organizations (though such support may be considered when determining whether a detainee was "part of" one of these groups).[40] As discussed *supra*, in *Al-Bihani v. Obama* a three-judge D.C. Circuit panel endorsed the definitional standard used by Judge Leon to assess the Executive's detention authority. It is possible that this issue will be the subject of further litigation, either before the circuit court sitting *en banc* or the Supreme Court.

Several (though not all) district court judges have concluded that an individual's continuing threat to U.S. security is not a relevant consideration in determining whether he may be lawfully detained under the AUMF.[41] At least one district court judge has expressly held that "the President

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2008)). *See also* Kiyemba v. Obama, 561 F.3d 509, 512 n.1 (D.C. Cir. 2009) (in *habeas* case, noting that *Boumediene* "referred to § 7 without specifying a particular subsection of § 2241(e) but its discussion of the Suspension Clause clearly indicates it was referring only to that part of § 7 codified at § 2241(e)(1)")).

[38] Boumediene v. Bush, 583 F.Supp.2d 133 (D.D.C. 2008) (Leon, J.).

[39] Gherebi v. Obama, 609 F.Supp.2d 43 (D.D.C. 2009) (Walton, J.); Al-Adahi v. Obama, 2009 WL 2584685 (D.D.C. August 21, 2009) (Kessler, J.).

[40] Hamlily v. Obama, 616 F.Supp.2d 63 (D.D.C. 2009) (Bates, J.); Mattan v. Obama, 618 F.Supp.2d 24 (D.D.C. 2009) (Lamberth, C.J.). In assessing whether an individual was "part of" the Taliban, Al Qaeda, or associated forces, several *habeas* judges have considered whether "the individual functions or participates within or under the command structure of the organization—i.e. whether he receives and executes orders or directions." *Hamlily*, 616 F.Supp.2d at 75; Al Odah v. United States, 648 F.Supp.2d 1, 7 (D.D.C. 2009) (Kollar-Kotelly, J.) (citing *Hamlily*); Awad v. Obama, 646 F.Supp.2d 20, 23 (D.D.C. 2009) (Robertson, J.) (same).

[41] Al-Adahi v. Obama, No. 05-280, 2010 WL 811280, at *4 (Kessler, J.); *Awad*, 646 F.Supp.2d at 24; Anam v. Obama, No. 04-1194, 2010 WL 58965, at *14 (D.D.C. Jan. 6, 2010) (Hogan, J.) (upholding detention of petitioner, despite finding that he did not pose a continuing threat to the United States.)

is authorized to detain [a properly designated enemy belligerent] for the duration of the conflict in Afghanistan, even if [he] poses no threat of returning to the field of battle."[42] However, this conclusion has not been endorsed by every district court judge who has considered the issue.[43]

Al Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009)

In April 2009, District Court Judge John D. Bates found in the case of *Al Maqaleh v. Gates* that the constitutional writ of *habeas* may extend to non-Afghan detainees currently held by the United States at the Bagram Theater Internment Facility in Afghanistan, when those detainees had been captured outside of Afghanistan but were transferred to Bagram for long-term detention as enemy combatants. Judge Bates held that the circumstances surrounding the detention of the petitioners in *Al Maqaleh* were "virtually identical to the detainees in *Boumediene*—they are [non-U.S.] citizens who were ... apprehended in foreign lands far from the United States and brought to yet another country for detention."[44] Applying the factors discussed in *Boumediene* as being relevant to a determination of the extraterritorial scope of the writ of *habeas corpus*, Judge Bates concluded that the writ extended to three of the four petitioners at issue in *Al Maqaleh*, who were not Afghan citizens. The constitutional writ was not found to extend to a fourth petitioner who was an Afghan citizen, however, because review of his *habeas* petition could potentially cause friction with the Afghan government.[45] This ruling has been appealed. Presuming that the ruling is upheld, it could have significant ramifications for U.S. detention policy, as at least some foreign detainees held outside the United States or Guantanamo could seek review of their detention by a U.S. court. On September 14, 2009, the DOD announced modifications to the administrative process used to review the status of aliens held at Bagram, which would afford detainees greater procedural rights. The modified process does not contemplate judicial review of administrative determinations regarding the detention of persons at Bagram.[46]

Criminal Cases

Although numerous cases have been brought in federal civilian court involving persons who allegedly engaged in terrorist activity, relatively few involve persons who were captured abroad by U.S. forces during operations against either Al Qaeda or the Taliban, and only one case has been tried in civilian court involving a person involved in the September 11, 2001, terrorist attacks. This section discusses notable rulings made in criminal cases involving Zacharias Moussaoui, who was tried and convicted for his role in the September 11, 2001, terrorist attacks, but was never officially designated as an "enemy combatant"; John Walker Lindh, thus far the

[42] *Al-Adahi*, 2010 WL 811280, at *4.

[43] *See* Basardh v. Obama, 612 F.Supp.2d 30, 34 (D.D.C. 2009)(Huvelle, J.) ("the AUMF does not authorize the detention of individuals beyond that which is necessary to prevent those individuals from rejoining the battle").

[44] *Al Maqaleh*, 604 F. Supp. 2d at 209 (D.D.C. 2009).

[45] *Id.* at 229-230.

[46] Under this new system, detainees would undergo a case review within 60 days of incarceration, with periodic review occurring roughly every six months thereafter. Further, U.S. military members shall act as personal representatives to assist detainees during the review process. Letter from Phillip Carter, Dep. Asst. Sec. Defense for Detainee Policy, to Sen. Carl Levin, Chairman of Sen. Armed Serv. Comm., July 14, 2009, available at http://www.scotusblog.com/wp/wp-content/uploads/2009/09/US-Bagram-brief-9-14-09.pdf; Gerry J. Gilmore, "Bagram Detention Facility to Implement Case Review Panels," *American Forces Press Service*, September 14, 2009, http://www.defenselink.mil/news/newsarticle.aspx?id=55831.

only person captured abroad and tried and convicted in federal civilian court for belligerent activities occurring on the Afghan battlefield; and Ahmed Khalfan Ghailani, a suspect in the 1998 African Embassy bombings who was incarcerated at Guantanamo and charged at a military commission, but was later transferred to the Southern District of New York for trial on terrorism charges. Ghailani is the only Guantanamo prisoner to have been transferred for civilian trial in the United States.

Moussaoui Litigation

Zacharias Moussaoui, a French citizen, was arrested by immigration authorities for overstaying his visa after he raised suspicions at a Minnesota flight school where he was enrolled. Less than a month after he was taken into custody, a group of Al Qaeda terrorists carried out the September 11, 2001, attacks, and Moussaoui was charged in connection with the conspiracy to commit those attacks. On January 7, 2002, after Moussaoui's arraignment, the Department of Justice (DOJ) imposed Special Administrative Measures (SAMs) to prevent his communication with other terrorists. Moussaoui was permitted unmonitored attorney/client and consular communications and mail, and monitored communications with others. The court also issued a protective order under the Classified Information Procedures Act (CIPA; 18 U.S.C. app. 3, § 3), which permitted defense counsel to access classified information, but did not permit Moussaoui to receive such information unless the government consented or the judge determined that it was necessary to protect his right to prepare a defense.

After a competency hearing in which the judge explained that the lack of personal access to classified information could impede Moussaoui's ability to defend himself without counsel appropriately cleared for access to such information, the judge permitted the defendant to proceed *pro se*, and appointed the public defenders who had been assigned to the case to act as standby counsel. After Moussaoui refused to cooperate with his appointed lawyers, the judge replaced some of them, but ultimately concluded that Moussaoui was unlikely to approve any court-appointed attorneys, and also held that he was not entitled to unmonitored access to "advisory counsel" of his choice. Despite Moussaoui's rejection of virtually all efforts by standby counsel to assist him, the lawyers continued to file motions on his behalf, including motions seeking relief from the SAMs or to revoke his *pro se* status on the grounds that he was not in a position to take advantage of exculpatory information in the government's possession. Moussaoui attempted to plead guilty in July, 2002, but was unwilling to admit to the facts necessary to support the plea and withdrew it.

Moussaoui then sought access to several persons held overseas by the government as enemy combatants who might provide information that would be useful to his defense by testifying that Moussaoui was not involved in the September 11 attacks. (The government had advanced theories that Moussaoui was the intended "20th hijacker" or pilot of a fifth plane intended to target the White House, whose participation in the actual attack was thwarted due to his incarceration, and that Moussaoui's refusal to provide agents information about the plot that might have prevented the attacks from taking place contributed to the deaths of the several thousand victims, a factor relevant to death penalty eligibility. Moussaoui claimed to be part of a plan for subsequent terrorist operations and to have had no knowledge regarding the September 11 plot.) The government offered to provide redacted summaries of reports presumably based on intelligence interrogations of the enemy combatant witnesses,[47] but the judge rejected the

[47] The exact nature of the information and its acquisition by the government is obscured by the many redactions in the (continued...)

proffered substitutions as possibly unreliable and inadequate to protect Moussaoui's Sixth Amendment right to compulsory process.

The government appealed the district court's order requiring the government to make three of the requested enemy combatant witnesses available for deposition to be conducted by remote video. The United States Court of Appeals for the Fourth Circuit affirmed the district court's holding that that the enemy combatants in question could be reached through judicial process (directed at their custodians) for the purpose of providing testimony and that their testimony would be relevant to the case, but reversed the order for depositions and the sanctions the court had imposed for the government's refusal to comply. [48] The appellate court held that substitutions for depositions could be prepared that would provide substantially the same ability to prepare a defense, although it agreed with some of the objections the district court had articulated regarding the government's proposed substitutions. The majority viewed the intelligence reports as possessing adequate indicia of reliability because they were produced through methods designed to produce accurate analyses of foreign intelligence.[49] Consequently, the court remanded the case to the district court with instructions to prepare substitutions for the deposition testimony by a process involving collaboration with the parties,[50] noting that adequate jury instructions would be necessary in some cases to permit the jury to assess the reliability of the evidence.

In the meantime, the district court revoked Moussaoui's *pro se* privilege for his continued submission of improper filings, some of which contained veiled or overt threats, political statements with no relevance to the case, attempts at communicating to persons overseas, and insulting language, despite repeated warnings that such conduct would result in sanctions. After the Supreme Court denied certiorari with respect to the appellate court's ruling on his right to depose enemy combatant witnesses in the custody of the United States, Moussaoui again decided, over his counsel's objections, to plead guilty as an apparent tactic to avoid the death penalty. After a hearing in which Moussaoui demonstrated to the court's satisfaction that he understood a guilty plea would result in forfeiting his right to appeal based on any violation of his constitutional

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reported opinions.

[48] United States v. Moussaoui, 382 F.3d 453, 456-57 (4th Cir. 2004) ("*Moussaoui II*"). In "*Moussaoui I*," 333 F.3d 509, 517 (4th Cir. 2003), the circuit court dismissed the appeal of the discovery order as unripe and remanded for the government to propose substitutions for the witness testimony similar to those available under CIPA. (CIPA applies to the production of documents during discovery but does not address witnesses). The district court imposed sanctions on remand after the government refused to make the enemy combatant witnesses available for deposition. The judge rejected the parties' proposal for an order of dismissal, the ordinary sanction under CIPA in cases in which the government declines to provide classified information the court has determined is necessary for the defense. Instead, she dismissed the death notice on the grounds that the witnesses could provide testimony that might preclude a jury from finding Moussaoui eligible for the death penalty. Because the testimony could exonerate Moussaoui of involvement in the September 11 attacks, the district court prohibited the government "from making any argument, or offering any evidence, suggesting that the defendant had any involvement in, or knowledge of, the September 11 attacks." United States v. Moussaoui, 282 F. Supp. 2d 480, 327 (E.D. Va. 2003). Evidence that would have been excluded under the order included cockpit voice recordings, video footage showing the collapse of the World Trade Center Towers, and photographs of victims.

[49] 382 F.3d at 487 n. 31. Judge Gregory noted in dissent that such information may be reliable for intelligence purposes and yet omit relevant information that might be helpful to the defense because such information was not deemed to have any actionable foreign intelligence value. *Id*. at 488, n. 6.

[50] As noted by a dissenting judge of the appellate panel, the procedures crafted by the majority deviate from CIPA procedures by having the district judge, rather than the government, prepare the substitutions for the potential testimony, arguably making the district court judge an advocate in the proceedings. 382 F.3d. at 484-85 (Gregory, J., concurring in part and dissenting in part).

rights that might have occurred prior to the plea, the court accepted his plea. Moussaoui admitted to the government's allegations, including some he had previously denied, and signed the statement of facts supporting the guilty plea, adding the designation of "20th Hijacker" below his signature. During the sentencing phase, Moussaoui claimed that his mission on September 11 was to have been piloting a commercial airliner into the White House, although statements by enemy combatant witnesses introduced by the government contradicted that claim, along with some other allegations Moussaoui had admitted as true. In the bifurcated sentencing proceeding, the jury found Moussaoui to be eligible to receive the death penalty but declined to impose it, sentencing him instead to life in prison.

Just days after receiving his sentence, Moussaoui filed a motion to withdraw his guilty plea, claiming that his understanding of the American legal system had been "completely flawed" and asking for a new trial "[b]ecause I now see that it is possible that I can receive a fair trial ... even with Americans as jurors and that I can have the opportunity to prove that I did not have any knowledge of and was not a member of the plot to hijack planes and crash them into buildings on September 11, 2001."[51] He then appealed the court's denial of his motion for a new trial, arguing among other things that his plea was not voluntary as a matter of law because of district court rulings that violated his constitutional rights, and that it was not knowing because he did not have access to classified information in the government's possession that contradicted the government's theory of the case. Finding that his guilty plea was entered with full knowledge and understanding of its ramifications and that his objections to constitutional claims were waived, the circuit court affirmed. The circuit court reviewed the procedural history regarding Moussaoui's access to classified information because these claims were relevant to the adequacy of the plea and were therefore not waived for purposes of appeal, but reiterated its earlier view that adequate substitutions under CIPA would have protected Moussaoui's rights had the CIPA process not been cut short by the guilty plea. Moreover, it noted that CIPA information had been made available during the sentencing phase for establishing death-eligibility factors, and that not only did Moussaoui make no effort to withdraw his plea upon receiving the information, but he contradicted the supposedly exculpatory statements at trial. Finally, the circuit court rejected Moussaoui's contention that plain error had resulted in the jury's false belief that the only sentencing options available to them were the death penalty or life imprisonment without possibility of parole, in violation of his right to have his sentence decided by the jury, on the basis that Moussaoui had requested the jury be instructed that the sentencing options were limited as part of an apparently successful strategy to avoid the death penalty.

United States v. Lindh, 227 F. Supp. 2d 565 (E.D. Va. 2004)

John Walker Lindh, a U.S. citizen, was captured in Afghanistan and charged with ten counts of supplying services to the Taliban under various statutes. He moved to have the charges dismissed, arguing, *inter alia* that he was entitled to combatant immunity as part of the Taliban. While the judge refused to accept the government's argument that the President's designation of Lindh as an "unlawful combatant" was not subject to second-guessing by the court, he nevertheless concluded that the Taliban is not entitled to combatant immunity under international law and rejected the defense.[52]

[51] Moussaoui v. Obama, 591 F.3d 263, 278 (4th Cir. 2010).

[52] United States v. Lindh, 212 F. Supp. 2d 541, 557-58 (E.D. Va. 2002). The judge also rejected Lindh's contention that media publicity had rendered a fair trial for him impossible, at least in that particular court, and that the International (continued...)

Lindh was also unsuccessful in his bid to avoid the government's request for a protective order covering unclassified but sensitive information as well as classified information that the government had concluded was subject to discovery by the defendant.[53] At issue was whether the defendant could adequately prepare a defense given the government's proposal to restrict certain information from the government's redacted reports of relevant interviews with detainees held at Guantanamo. Rule 16(d) of the Federal Rules for Criminal Procedure permits the court to restrict discovery with respect to any information for good cause, including cases where the government claims the protection of such information is vital to the national security. The court found good cause to issue a protective order to prohibit the public dissemination of the detainee interview reports, which would serve to prevent Al Qaeda members from learning "the status of, the methods used in, and the information obtained from the ongoing investigation of the detainees."[54] Lindh objected to the order on the basis that it would burden his ability to prepare for trial by requiring the pre-screening of investigators and expert witnesses before he would be permitted to disclose unclassified information to them, which he argued could reveal his defense strategy to the prosecution. The judge found the needs of both parties could be accommodated by amending the proposed order to require investigators or expert witnesses for the defense to sign a memorandum of understanding, under oath, promising not to disclose information provided under the order, rather than requiring pre-screening. Lindh also objected to the proposed protective order because he believed it would impair his ability to use the media to influence public opinion, as he contended the government had done. Noting that the "[d]efendant has no constitutional right to use the media to influence public opinion concerning his case so as to gain an advantage at trial" under either the Sixth Amendment right to a public trial or the public's First Amendment right to a free press,[55] the judge rejected the argument, but cautioned that information that turned out to be relevant and material to the trial as the case progressed might eventually require unsealing to further those rights.[56]

Prior to the beginning of the merits phase of the trial, Lindh struck a plea deal with prosecutors, admitting to one count of carrying an explosive during the commission of a felony, and was sentenced to 20 years' imprisonment.

United States v. Ghailani, No. S10 98 Crim. 1023 (S.D.N.Y.)

Alleged Al Qaeda member Ahmed Khalfan Ghailani was indicted in 1998 and charged with conspiracy to kill Americans abroad in connection with the bombing the United States Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania. He was arrested in Pakistan in 2004 and turned over to U.S. custody to be held and interrogated at an undisclosed site abroad by Central Intelligence Agency (CIA) officials. In 2006, he was transferred to DOD custody and held as an enemy combatant at Guantanamo. He was charged before a military commission for his role in one of the embassy bombings, but the charges were later withdrawn so that he could be

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Economic Emergency Powers Act ("IEEPA") (50 U.S.C. § 1701 et seq.) regulations he was charged with violating were not valid.

[53] United States v. Lindh, 198 F. Supp. 2d 739 (E.D. Va. 2002).

[54] *Id.* at 742.

[55] *Id.* at 743.

[56] *Id.* at 744.

transferred to the Southern District of New York to be tried on the earlier indictment. The transfer occurred in May 2009.

Ghailani moved for an injunction or other relief against the Secretary of Defense to prevent the reassignment of the military defense attorneys who had been detailed to serve as his defense counsel before the military commission. Ghailani urged the court to order the government to permit the two officers to act as his appointed counsel in federal court, arguing that depriving him of the assistance of the counsel he had grown to trust amounted to a violation of his Sixth Amendment right to the effective assistance of counsel. The government urged the court to decline to adjudicate the motion or grant relief based on the political question doctrine, arguing that the assignment of military officers to particular duties is the prerogative of the executive branch alone. The judge did not think the political question doctrine prevented his consideration of the matter, since he was not considering the propriety of the reassignment as much as he was assessing the impact of the decision on the defendant's rights, but ultimately denied the motion, holding that an indigent defendant's right to appointed representation does not mean the right to continuous representation by counsel of his choice.[57]

Ghailani has also filed a motion for dismissal of his indictment based on his claim that the government violated his Sixth Amendment right to a speedy trial. In connection with this motion, Ghailani sought discovery of documents in the government's possession that demonstrate the government delayed his prosecution from 2004 until his transfer to New York for reasons other than national security. Rule 16 of the Federal Rules for Criminal Procedure permits discovery of items "within the government's custody, possession, or control" that are material to the case, excluding documents that were prepared by government attorneys or agents that constitute work product connected to the prosecution. The judge excluded one document specifically requested by the defendant as attorney work product, but approved a more general request for information relating to the reasons behind the timing of Ghailani's transfer for trial based on a Supreme Court ruling that makes the "reason for delay" one part of the test for determining whether charges must be dismissed for failure to provide a speedy trial.[58] The judge defined the scope of "in the government's possession, custody, or control" as reaching beyond the officials of the U.S. Attorney's Office who had worked on the case to include higher-level DOJ officials who were not intimately involved in the case but were involved in the decision about where to prosecute Ghailani. This requirement will not unduly burden the prosecution with unreasonable discovery requirements, according to the court, because the embassy bombing crime had "commanded the attention of the highest levels" of the government long before Ghailani was in American custody. Under these circumstances, high-level officials involved in the important decisions involving Ghailani's treatment can be included within the meaning of "government" in Rule 16.[59] Accordingly, the judge issued an order requiring production of documents held by the DOJ that are material to the case and not otherwise privileged under the rule.

[57] United States v. Ghailani, No. S10 98 Crim. 1023, slip op. at 30, 2009 WL 3853799, at *11-12 (S.D.N.Y. Nov. 18, 2009) (citing Morris v. Slappy, 461 U.S. 1, 14 (1983); Wheat v. United States, 486 U.S. 153, 159 (1988)).

[58] United States v. Ghailani, No. S10 98 Crim. 1023, slip op. at 7-8, 2010 WL 653269, at *2-3 (S.D.N.Y. Jan. 21, 2010) (citing Barker v. Wingo, 407 U.S. 514 (1972)).

[59] *Id.*, slip op. at 12, 2010 WL 653269, at *4.

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